

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MISHELLE J. KUEMPEL,)	
)	No. CV-05-0113-MWL
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on January 9, 2006. (Ct. Rec. 11, 14). Plaintiff Mishelle Kuempel ("Plaintiff") filed a reply brief on December 23, 2005. (Ct. Rec. 18). Attorney Donald Charles Bell represents Plaintiff; Special Assistant United States Attorney Jeffrey H. Baird represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 11), **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 14), and **REMANDS** the case for further proceedings.

1 of the ALJ's decision. (AR 25). She completed the ninth grade in
2 school and she has past relevant work as an aircraft mechanic at
3 Boeing. (AR 79, 90-91, 202-203, 208). She indicated that she
4 stopped working because Boeing could no longer find her work that
5 did not cause her pain. (AR 202).

6 At the supplemental administrative hearing held on May 11,
7 2004, Plaintiff testified that she was alleging an onset of
8 disability date of September 19, 2001, the date she had her first
9 carpal tunnel surgery. (AR 77). She indicated she was medically
10 laid off of Boeing on March 26, 2002. (AR 77-78).

11 Plaintiff testified that the pain in her hands is the number
12 one thing that prevents her from working. (AR 82). She stated
13 that she had two surgeries for carpal tunnel in 2001, one on each
14 hand. (AR 82-83). She also had a trigger finger release on the
15 right hand in October of 2003. (AR 83). She indicated that she
16 had relief following the surgeries, but that she continues to have
17 a lack of full grip and the pain has continuously gotten worse
18 over time. (AR 83). Plaintiff testified that she has problems
19 grasping items, like soap in the shower and picking up cups, and
20 must therefore use two hands. (AR 100).

21 She indicated that she also has problems with pain in her
22 knees, shoulders, back and arms, but had not seen a doctor for
23 these ailments since October of 2002. (AR 84-85). She described
24 the pain in these areas as constant and worsening with activity.
25 (AR 85). Plaintiff testified that she had taken prescription
26 ibuprofen, as needed, but has not renewed her prescription since
27 it expired in April 2002. (AR 85-89). To relieve her pain, she
28 indicated that she would use heat and ice packs and relax or rest.

1 (AR 89). She testified that usually she has to rest 10 to 15
2 minutes every couple of hours. (AR 99).

3 Plaintiff stated that she could probably walk about five to
4 10 minutes, stand for 10 to 15 minutes and sit for 15 to 20
5 minutes before it starts to bother her. (AR 87). She indicated
6 that she could lift five to 10 pounds without it being a
7 significant problem for her. (AR 88). She stated that she is
8 able to do her own grooming, bathing and dressing, although she
9 has difficulty tying her shoes and, when her shoulders are sore,
10 she needs her husband's assistance with fastening her bra. (AR
11 97-98).

12 Plaintiff testified that she wakes up around 6:00 a.m. and
13 goes to bed around 10:00 p.m. getting only about three or four
14 hours of sleep per night. (AR 91-92, 99). With regard to daily
15 activities, she stated that she does housework and cooks when she
16 can, with her husband's assistance, and walks the dog a couple of
17 times a day for about five minutes at a time. (AR 92). She
18 indicated that she watches a little television and used to enjoy
19 doing yard work and riding four-wheelers, but is not able to
20 partake in those hobbies as often due to her pain. (AR 92-93).
21 She stated that she goes grocery shopping with her husband once a
22 week for five to 10 minutes. (AR 93). She testified that the
23 longest trip she has taken since September of 2001 is a drive to
24 Arizona in March of 2004. (AR 80-81). However, Plaintiff
25 indicated that her share of the driving on that trip consisted of
26 only about 15 minutes total for the whole trip. (AR 98).

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1 Medical expert Glen A. Almquist, M.D., testified by telephone
2 at the administrative hearing held on February 25, 2004, and in
3 person at the hearing held on June 23, 2004, and vocational expert
4 Tom Moreland testified in person at the administrative hearing
5 held on June 23, 2004. (AR 44-66, 107-135).

6 **SEQUENTIAL EVALUATION PROCESS**

7 The Social Security Act (the "Act") defines "disability" as
8 the "inability to engage in any substantial gainful activity by
9 reason of any medically determinable physical or mental impairment
10 which can be expected to result in death or which has lasted or
11 can be expected to last for a continuous period of not less than
12 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
13 Act also provides that a Plaintiff shall be determined to be under
14 a disability only if any impairments are of such severity that a
15 Plaintiff is not only unable to do previous work but cannot,
16 considering Plaintiff's age, education and work experiences,
17 engage in any other substantial gainful work which exists in the
18 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
19 Thus, the definition of disability consists of both medical and
20 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
21 (9th Cir. 2001).

22 The Commissioner has established a five-step sequential
23 evaluation process for determining whether a person is disabled.
24 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
25 is engaged in substantial gainful activities. If so, benefits are
26 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
27 not, the decision maker proceeds to step two, which determines
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1 whether Plaintiff has a medically severe impairment or combination
2 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
3 416.920(a)(4)(ii).

4 If Plaintiff does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment
6 is severe, the evaluation proceeds to the third step, which
7 compares Plaintiff's impairment with a number of listed
8 impairments acknowledged by the Commissioner to be so severe as to
9 preclude substantial gainful activity. 20 C.F.R. §§
10 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
11 App. 1. If the impairment meets or equals one of the listed
12 impairments, Plaintiff is conclusively presumed to be disabled.
13 If the impairment is not one conclusively presumed to be
14 disabling, the evaluation proceeds to the fourth step, which
15 determines whether the impairment prevents Plaintiff from
16 performing work which was performed in the past. If a Plaintiff
17 is able to perform previous work, that Plaintiff is deemed not
18 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
19 At this step, Plaintiff's residual functional capacity ("RFC")
20 assessment is considered. If Plaintiff cannot perform this work,
21 the fifth and final step in the process determines whether
22 Plaintiff is able to perform other work in the national economy in
23 view of Plaintiff's residual functional capacity, age, education
24 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
25 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

26 The initial burden of proof rests upon Plaintiff to establish
27 a *prima facie* case of entitlement to disability benefits.
28 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

1 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
2 met once Plaintiff establishes that a physical or mental
3 impairment prevents the performance of previous work. The burden
4 then shifts, at step five, to the Commissioner to show that (1)
5 Plaintiff can perform other substantial gainful activity and (2) a
6 "significant number of jobs exist in the national economy" which
7 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
8 Cir. 1984).

9 **STANDARD OF REVIEW**

10 Congress has provided a limited scope of judicial review of a
11 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
12 the Commissioner's decision, made through an ALJ, when the
13 determination is not based on legal error and is supported by
14 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
15 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
16 1999). "The [Commissioner's] determination that a plaintiff is
17 not disabled will be upheld if the findings of fact are supported
18 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
19 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
20 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
21 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
22 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
23 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
24 573, 576 (9th Cir. 1988). Substantial evidence "means such
25 evidence as a reasonable mind might accept as adequate to support
26 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
27 (citations omitted). "[S]uch inferences and conclusions as the
28 [Commissioner] may reasonably draw from the evidence" will also be

1 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

2 On review, the Court considers the record as a whole, not just the
3 evidence supporting the decision of the Commissioner. *Weetman v.*
4 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
5 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

6 It is the role of the trier of fact, not this Court, to
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
8 evidence supports more than one rational interpretation, the Court
9 may not substitute its judgment for that of the Commissioner.
10 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
11 (9th Cir. 1984). Nevertheless, a decision supported by
12 substantial evidence will still be set aside if the proper legal
13 standards were not applied in weighing the evidence and making the
14 decision. *Browner v. Secretary of Health and Human Services*, 839
15 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
16 evidence to support the administrative findings, or if there is
17 conflicting evidence that will support a finding of either
18 disability or nondisability, the finding of the Commissioner is
19 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
20 1987).

21 ALJ'S FINDINGS

22 The ALJ found at step one that Plaintiff has not engaged in
23 substantial gainful activity since the alleged onset date,
24 September 19, 2001. (AR 26). At step two, the ALJ found that
25 Plaintiff has the severe impairments of bilateral carpal tunnel
26 syndrome, post surgery, and right trigger finger, post release,
27 but that she does not have an impairment or combination of
28 impairments listed in or medically equal to one of the Listings

1 impairments. (AR 30). The ALJ specifically indicated that
2 Plaintiff's complaints of back, neck, shoulder and knee pain were
3 not severe impairments since they have not resulted in significant
4 limitations. (AR 30).

5 The ALJ concluded that Plaintiff has the RFC to perform a
6 wide range of light exertion work. (AR 32). The ALJ found that
7 Plaintiff could occasionally lift or carry 20 pounds, frequently
8 lift or carry 10 pounds, stand two hours at a time for a total of
9 six hours in an eight-hour workday, walk two hours at a time for a
10 total of six hours in an eight-hour workday, sit two hours at a
11 time (with normal breaks) for a total of about six hours in an
12 eight-hour workday, perform no heavy prolonged gripping (no more
13 than ten to twenty pounds) and only occasionally use heavy
14 vibrating equipment. (AR 32).

15 At step four of the sequential evaluation process, the ALJ
16 found that Plaintiff lacks the RFC to perform the exertional
17 requirements of her past relevant work as an assembler of aircraft
18 structures. (AR 33). However, the ALJ determined that, within
19 the framework of the Medical-Vocational Guidelines ("Grids") and
20 based on the vocational expert's testimony and Plaintiff's RFC,
21 age, education, and work experience, there were a significant
22 number of jobs in the national economy which she could perform
23 despite her limitations. (AR 33-35). Examples of such jobs
24 included work as a boat rental clerk, an usher, a photo shop
25 counter clerk, a cashier II, a laundry worker, a microfilm
26 production assistant, a storage facility rental clerk, and a
27 surveillance system monitor. (AR 34). The ALJ noted that the
28 vocational expert testified that even if an additional limitation

1 such as no repetitive, continuous use of the bilateral hands for
2 fine and gross manipulation activities were added to the RFC, the
3 individual could still do all of the jobs listed. (AR 34-35).
4 Accordingly, the ALJ determined at step five of the sequential
5 evaluation process that Plaintiff was not disabled within the
6 meaning of the Social Security Act. (AR 35-36).

7 ISSUES

8 Plaintiff contends that the Commissioner erred as a matter of
9 law. Specifically, she argues that:

10 1. The ALJ improperly relied on the testimony of the
11 medical expert, Glen Almquist, M.D.;

12 2. The ALJ erred by giving more weight to the opinion of
13 Dr. Almquist, a nonexamining physician, than to independent
14 medical examiner Dr. David Green;

15 3. The ALJ's opinion that Plaintiff is not credible is
16 erroneous and not properly supported;

17 4. The ALJ failed to consider the testimony of lay
18 witnesses; and

19 5. The ALJ erred by relying on vocational expert testimony
20 which was based on a hypothetical that did not include all of
21 Plaintiff's physical limitations.

22 This Court must uphold the Commissioner's determination that
23 Plaintiff is not disabled if the Commissioner applied the proper
24 legal standards and there is substantial evidence in the record as
25 a whole to support the decision.

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DISCUSSION

A. Credibility

1. Plaintiff

Plaintiff argues that the ALJ's opinion that Plaintiff is not credible is erroneous and not properly supported. (Ct. Rec. 11-2, pp. 15-18). The Commissioner responds that the ALJ appropriately gave clear and convincing reasons to discredit Plaintiff. (Ct. Rec. 15, pp. 8-10).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying impairment, the ALJ may not discredit her testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). There is no affirmative evidence of malingering in this case; therefore, the ALJ was required to give "clear and convincing" reasons for rejecting Plaintiff's testimony. *Lester*, 81 F.3d at 834.

The ALJ determined that Plaintiff was not credible and that her statements concerning her pain, symptoms and limitations were thus not persuasive. (AR 31-32). In support of this finding, the ALJ indicated as follows: (1) the record reflects that Plaintiff is not taking any prescribed medication for her pain, yet

1 describes her pain as a seven out of ten on average and spiking
2 every hour for up to five minutes at a time to a level nine or
3 ten; (2) although Plaintiff testified at the supplemental hearing
4 to significant limitations regarding sitting, standing and
5 walking, she earlier reported she could lift 10 to 20 pounds
6 occasionally, reach frequently and occasionally perform handling
7 and fingering; (3) the only time Plaintiff was given limitations
8 was for a very short period from February 2002 through March 2002
9 by Dr. Schaff, related to her knee pain; and (4) no treating or
10 examining physician has opined that she is totally unable to
11 perform some type of employment.

12 While it is true that Plaintiff indicated that she did not
13 take prescribed medication for her pain, she testified that she
14 takes ibuprofen, uses heat and ice pack and takes periodic rests
15 for her pain. (AR 85, 89, 99). Despite the fact that she takes
16 no prescription medications, there is no evidence in the record
17 that Plaintiff failed to seek treatment or otherwise follow a
18 prescribed course of treatment.

19 With regard to the ALJ's notation as to the Plaintiff's
20 statements regarding her limitations, the differences between the
21 May 12, 2002 Daily Activity Questionnaire and Plaintiff's
22 testimony on May 11, 2004 (two years later) were minor and could
23 be explained by a possible worsening of her condition over time.

24 Finally, the ALJ's comments that the only physician to assess
25 limitations was Dr. Schaff and that no treating or examining
26 physician has opined that Plaintiff is unable to work is not
27 supported by the record. As noted by Plaintiff (Ct. Rec. 18, p.
28 5), on January 6, 2004, Plaintiff's treating physician, James W.

1 Lamberton, D.O., indicated that Plaintiff could not return to full
2 work duty, without restrictions (AR 331), independent medical
3 examiner, David Green, M.D., opined on April 26, 2004, that it was
4 premature to determine whether Plaintiff could go back to work
5 with appropriate restrictions and limitations and that Plaintiff's
6 condition was not fixed and stable (AR 351-352), and Dr. Lamberton
7 stated on June 15, 2004, that any vocational rehabilitation plans
8 needed to be placed on hold until she recovered from a planned
9 July 16, 2004, repeat right carpal release (AR 358). Moreover,
10 even the ALJ concluded that the record evidence supported a
11 finding that Plaintiff could not return to her past relevant work
12 because she was not able to perform medium exertion work. (AR
13 33). The ALJ specifically found that Plaintiff was restricted to
14 the performance of light exertion work with further limitations on
15 her ability to stand, walk and sit as well as restriction on the
16 use of her hands. (AR 32).

17 The ALJ is responsible for reviewing the evidence and
18 resolving conflicts or ambiguities in testimony. *Magallanes v.*
19 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
20 trier of fact, not this Court, to resolve conflicts in evidence.
21 *Richardson*, 402 U.S. at 400. The Court has a limited role in
22 determining whether the ALJ's decision is supported by substantial
23 evidence and may not substitute its own judgment for that of the
24 ALJ even if it might justifiably have reached a different result
25 upon de novo review. 42 U.S.C. § 405(g). However, after
26 reviewing the record, the undersigned judicial officer finds that
27 the ALJ failed to provide "clear and convincing" reasons for

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1 finding Plaintiff not credible. Accordingly, Plaintiff's
2 testimony was not rejected on permissible grounds.

3 **2. Lay Witnesses**

4 Plaintiff also contends that the ALJ erred by not making
5 proper credibility findings as to the testimony of lay witnesses
6 James Kuempel, Plaintiff's husband (AR 236-238), and Terry
7 Lennier, Plaintiff's step-daughter (AR 214-215). (Ct. Rec. 11-2,
8 pp. 18-19). The ALJ may not ignore or improperly reject the
9 probative testimony of a lay witness without giving reasons that
10 are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919
11 (9th Cir. 1993). The ALJ shall "consider observations by non-
12 medical sources as to how an impairment affects a claimant's
13 ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
14 1987), *citing* 20 C.F.R. § 404.1513(e)(2).

15 The ALJ made note of the written statement of Ms. Lennier and
16 the declaration of Mr. Kuempel; however, the ALJ indicated that
17 while the statements were considered, "the close relationship
18 between the claimant and these individuals and the possibility
19 that their statements were influenced by their desire to help the
20 claimant cannot be entirely ignored in deciding how much weight to
21 accord the statements." (AR 32). The Commissioner argues that
22 the ALJ was "entitled to pass over them without statement," and
23 that "[a]dvocacy discredits testimony." (Ct. Rec. 15, pp. 9-10).

24 However, "the fact that a lay witness is a family member
25 cannot be a ground for rejecting his or her testimony."
26 *Regennitter v. Commissioner*, 166 F.3d 1294, 1298 (9th Cir. 1999)
27 (citations omitted). Although the ALJ provided a specific reason
28 to reject the lay witness testimony (close relationship), the

1 rationale was not legitimate according to Ninth Circuit case law.
2 Accordingly, the ALJ also erred with regard to his rejection of
3 the lay witnesses' testimony.

4 **B. Reliance on Medical Expert**

5 Plaintiff contends that the ALJ erred by relying on the
6 opinions of a nonexamining medical advisor, Glen Almquist, M.D.,
7 and that the ALJ erred by not according more weight to the
8 independent medical exam of Dr. Green. (Ct. Rec. 11-2, pp. 14-
9 15). However, it is not entirely clear from Plaintiff's opening
10 and reply briefs what specific testimony of Dr. Almquist the
11 Plaintiff believes was given inappropriate weight by the ALJ over
12 the testimony of Dr. Green. (Ct. Rec. 11, 18). The Commissioner
13 responds that the ALJ reasonably relied upon the findings of Dr.
14 Almquist to find that Plaintiff did not meet or equal any Listings
15 and to set reasonable functional limitations. (Ct. Rec. 15, pp.
16 5-8).

17 The ALJ apparently discounted Dr. Green's opinion because
18 restrictions on the repetitive use of her upper extremities was
19 temporary and needed to be reevaluated after treatment. (AR 28).
20 A review of the record suggests the presence of major difficulties
21 which, if fully explored, may justify a finding of disability for
22 purposes of federal law. As evidenced by Plaintiff, she has had
23 four recent surgeries on her hands: a carpal tunnel release -
24 left hand on September 20, 2001, right carpal tunnel release on
25 November 8, 2001, surgery for release of her right ring finger on
26 October 28, 2003, and a repeat right carpal tunnel release on July
27 27, 2004. (Ct. Rec. 18, p. 3). Although it appears that
28 Plaintiff does in fact have significant problems, the Court has a

1 limited role in determining whether the ALJ's decision is
2 supported by substantial evidence and may not substitute its own
3 judgment for that of the ALJ even if it might justifiably have
4 reached a different result upon de novo review. 42 U.S.C. §
5 405(g). While the Commissioner makes a good case for the ALJ's
6 reliance on Dr. Almquist's findings (Ct. Rec. 15), the undersigned
7 finds that further review of the entire record, and in particular
8 Dr. Green's independent medical exam, would ensure that
9 Plaintiff's claim is fully addressed. Therefore, the undersigned
10 concludes that this case warrants a remand for additional
11 proceedings. Plaintiff's limitations and functioning must be
12 reevaluated, on remand, taking into consideration the opinions of
13 Dr. Green, as well as all record evidence. Plaintiff's new RFC
14 assessment shall then be presented to a vocational expert, at a
15 new hearing, in order to determine if she is capable of performing
16 work existing in sufficient numbers in the national economy.

17 CONCLUSION

18 Plaintiff argues that the ALJ's errors should result in this
19 Court reversing the ALJ's decision and awarding benefits. (Ct.
20 Rec. 11). The Court has the discretion to remand the case for
21 additional evidence and finding or to award benefits. *Smolen v.*
22 *Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award
23 benefits if the record is fully developed and further
24 administrative proceedings would serve no useful purpose. *Id.*
25 Remand is appropriate when additional administrative proceedings
26 could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
27 Cir. 1989). In this case, further development is necessary to
28 remedy defects and for a proper determination to be made.

1 On remand, the ALJ shall reevaluate and accord the
2 appropriate weight to the statements made by Plaintiff, Mr.
3 Kuempel and Ms. Lennier, and consider any other evidence or
4 testimony relevant to Plaintiff's disability claim. The ALJ shall
5 reassess Plaintiff's RFC, taking into consideration the opinions
6 of Dr. Green, as well as any additional or supplemental medical
7 evidence relevant to Plaintiff's claim for disability benefits.
8 The ALJ shall elicit the testimony of a medical expert at the new
9 administrative hearing to assist the ALJ in making the RFC
10 determination. Plaintiff's new RFC assessment should be presented
11 to a vocational expert, at the new hearing, in order to determine
12 if she is capable of performing work existing in sufficient
13 numbers in the national economy. Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is
16 **GRANTED in part** and the above captioned matter is **REMANDED** for
17 additional proceedings as outlined above and pursuant to sentence
18 four of 42 U.S.C. § 405(g).

19 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 14**) is
20 **DENIED**.

21 3. Judgment shall be entered for **PLAINTIFF**. An application
22 for attorney fees may be filed by separate motion.

23 4. The District Court Executive is directed to enter this
24 Order, provide a copy to counsel for Plaintiff and Defendant, and
25 **CLOSE** the file.

26 **DATED** this 17th day of February, 2006.

27 s/Michael W. Leavitt
28 MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE